No. 3896

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

PRESIDIO MINING COMPANY (a Corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT, and L. M. DOHERTY,

Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,

Appellees.

PRINTED ARGUMENT FOR RECEIVER.

(Filed by Leave of Court)

FRANK R. WEHE,
Attorney for Receiver.

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Argument on Behalf of Receiver.

By leave of this Court first obtained, the following is submitted on behalf of the Receiver—authority for this order permitting the appearance of the Receiver being found in the case of Hovey vs. McDonald, 109 U. S. 150 (27 L. Ed. 888).

Notwithstanding the indifferent attitude which a receiver during his incumbency of the office should maintain toward the parties to the action, still inasmuch as defendants in their brief do not confine their argument alone to the controversy between themselves and appellees, but seem to argue that the

Receiver was a trespasser, and should have returned the property in his hands at the close of the receivership without deduction of the compensation of himself and the fees of his attorney, and certain other items (see Appellants' Opening Brief, p. 10), it seems to be necessary for the Receiver to appear and make a showing.

The Receiver was appointed on the 20th day of February, 1918 (Orig. Tr., Vol. II, pp. 437–441), following a stipulation by the parties agreeing that Mr. Maling should be appointed, subject, however, to the reservation by defendants that the stipulation should not be construed to be any waiver, qualification, limitation or restriction upon their *appeal* from the order. (Same Record, p. 436.)

Attention is called to appellants' criticism of the Receiver to be implied from the argument of their counsel on pages 58 and 59 of their Opening Brief. Surely the Receiver, under the circumstances of this case, was not called upon, at his peril, to petition the lower Court for permission to resign, particularly in the face of the fact that notwithstanding this Court announced a decision reversing the order on October 27, 1919, appellants made no move to have the Receiver return the property until their motion made when they presented the Mandate of this Court on May 6, 1921 (This Record, Vol. II, p. 517), at which time the lower Court ordered the Receiver to deliver the property to the defendants.

It is true that the Receiver could have resigned, as suggested by appellants' counsel, and thus have abandoned the trust, or could have exacted the in-

demnity suggested; but defendants did not require an indemnity from plaintiff when the Receiver was appointed, yet there was at the time of the appointment ample authority for the imposition of such terms, if requested by a defendant.

See Atlantic Trust Co. vs. Chapman, 208 U. S., p. 360.

Surely, when a receiver is appointed, as in this case, where, outside of objections made by the defendants, seemingly more for the purpose of preserving a record than as a serious opposition to the possession of the Receiver, and where without motion to discharge him he is permitted to remain in possession until the final determination of the appeal, it may be assumed that he was not to be considered as a trespasser, and particularly so in view of the fact that on the whole case both the lower Court and this Court deemed it equitable that complainants should have substantial relief.

The theory of the Receiver on this argument is that following the action of the Supreme Court in the case of Palmer vs. State of Texas, 212 U. S. 118–132 (53 L. Ed. 455), if it appears to this Court that justice will be done in this case by allowing the items to the Receiver which appellants claim should be charged against him, to be paid out of the fund, that such course will be followed by this Court notwithstanding the reversal of the lower Court's order appointing the Receiver.

In so far as the Receiver's positions are concerned the facts will appear to be about as follows:

On the 20th day of February, 1918, the date of the appointment of the Receiver, the action had been tried in the lower court upon pleadings in which the minority stockholders, as complainants, charged that on certain equitable grounds the Presidio Mining Company was the beneficial owner of Section 5 and of all the profits from it, and that it was entitled in law and equity to have transferred to it the legal title (See Old Record, Vol. I, p. 73).

The defendants all appeared by the same solicitors and the answer of the Presidio Mining Company, verified by defendant B. S. Noyes, denied that it was the equitable owner of section 5, or that it was in law or in equity entitled to have transferred to it the legal title to Section 5. (Old Record, Vol. I, p. 133.) W. S. Noyes in a separate answer (Old Record, Vol. I, p. 198) makes the same denials.

Both answers pray that complainants take nothing by their amended bill of complaint.

At the trial the lower Court, by Van Fleet, Judge, found that the main matter for consideration in the case was the acquisition in the name of Wm. S. Noyes of Section 5, and on the conclusion of the trial decreed that Wm. S. Noyes should transfer Section 5 to the Presidio Mining Company by preparing deed, etc., and appointed the Receiver.

(NOTE.—In passing it is not out of place to state that the Presidio Mining Company owned the ground adjoining Section 5, and that this ground with its appurtenant reduction works—an expensive plant—constituted a complete

working mine; that Section 5 could be worked through the Presidio workings, its ores reduced in the Presidio Plant, and that the Presidio Mining Company was therefore the logical purchaser of Section 5, which had no appurtenant reduction works of any kind.)

Appellants then appealed from the order appointing the Receiver and assigned as error the judgment of the lower Court in finding and decreeing that the Presidio Mining Company was the lawful and equitable owner of Section 5, and also assigned as error the order of the Court that within thirty days from the date of the final decree Wm. S. Noyes should transfer Section 5 to the Presidio Mining Company by proper deed, etc. (See Old Record, Vol. IV, Exception XLIV, p. 1165, and Exception XLIX, pp. 1167, 1168.)

At the hearing on the appeal to this Court the order of the lower Court appointing the Receiver was reversed; but that part of the interlocutory decree of the lower Court providing that Section 5 should be transferred to the Presidio Mining Company was affirmed, although apparently upon a different ground—that is to say, while the lower Court arrived at its conclusion on the theory of a resultant trust, this Court adopted the theory of specific performance in that it was equitable under all of the circumstances of the case that the Presidio Mining Company should be the owner of Section 5, the Court working out a promise to convey from a willingness to convey, and the attendant circumstances.

While the grounds of the two Courts in form are not identical, in essence they are. See language of this Court in prevailing opinion on rehearing, emphasis on parts to save comment:

> "In view of *all the circumstances,* in the *interest of what appeared to be the substantial rights of the parties* and an *equitable and economical disposition of the controversy,* we treated the action as in the nature of a notice for the specific performance of an agreement to sell Section 5, with a notice to terminate the lease of November 19, 1913, in accordance with its terms and an accounting that would provide for the conveyance by William S. Noyes of Section 5 to the Presidio Mining Company upon the payment to him of the purchase price * * * in accordance with his repeated offer." (This case, 270 Fed. 405.)

This was said after the "case was tried *de novo* in this court" (p. 389). Therefore, notwithstanding the fact that as the pleadings stood the Presidio Mining Company and Mr. Noyes both denied that the Presidio Mining Company had any right to the transfer to it of Section 5, it is apparent that this Court, on *the whole case,* following the judgment and opinion of the lower Court upon the same case, found that it was equitable that William S. Noyes should convey Section 5 to the Presidio Mining Company; and the only substantial dispute between the lower Court and this Court upon the case was that this Court held that, under the circumstances of the case, there was no necessity for a receiver;

and it is apparent from the opinion that this lack of necessity was to some extent, at least, justified in the mind of this Court by the fact that it appeared to the Court from the *Testimony* of Mr. Noyes, as appears by the excerpt from the opinion on page 45 of appellant's brief, that he did not refuse to convey and that he was willing to convey upon the payment of the purchase price. *"This,"* say the Court, "deprived equity of its jurisdiction to declare Noyes' relation to the title fraudulent."

But it will be noted that this Court evidently having in mind what the situation of the Presidio Mining Company would be in case a dismissal of the action had been directed, and which the appellants on the appeal and in the lower Court insisted should have been done, did not direct a dismissal but entered a judgment compelling the conveyance of Section 5, evidently for the reason that had the action been dismissed, the answer of the Presidio Mining Company denying its right to have Section 5 transferred to it would probably have created an estoppel against it.

It is therefore apparent that both the lower Court and this Court were in accord upon the principal object of the amended bill. Complainants, as minority stockholders, were seeking a decree on the theory that Noyes was the Trustee of the company and that as such he was bound to transfer Section 5 to the company. This the lower Court upheld, and pending the accounting and transfer of the property appointed a Receiver. This Court, however, took another path toward the same result,—

that is to say, it found that Noyes had, in effect, promised to convey and was willing to convey, and was not, therefore, acting fraudulently; but it also decreed the transfer, and upon the premise that Noyes was willing to transfer, and conclusions inferred from other facts in evidence, held, in effect, that there was no necessity for the Receiver; so that the difference between the two Courts was one of logic with the subject of jurisdiction unquestioned. Both Courts exercised equitable jurisdiction, in that both Courts decreed the transfer, and both, in the face of a denial in the answers of the defendants that the Presidio Mining Company was entitled to the transfer. So that clearly the reversal of the lower Court was based only upon a difference of opinion between the two Courts as to what conclusion should be drawn from the evidence in the case; but on the whole case the substantive part of the judgment of the lower Court was affirmed. Therefore, it is submitted that the Receiver was in no sense a trespasser, in that the lower Court in appointing him acted within its jurisdiction, and that it is just and equitable that the expenses of the receivership, including the compensation of himself and his attorney, should in the first instance, at least, be a charge upon the fund in the Court's hands at the time of the different allowances.

The Receiver himself, of course, took the property of the Presidio Mining Company into his charge by order of the lower Court, and when a Court, exercising jurisdiction in equity, appoints a receiver of

the property of a corporation "the Court assumes the administration of the estate" and "the contracts he [the Receiver] makes, and the engagements into which he enters from time to time under the order of the Court are, in a substantial sense, the contracts and engagements of the Court. The liabilities which he incurs are the liabilities chargeable upon the property under the control and in the possession of the Court and not liabilities of the parties."

Atlantic Trust Co. vs. Chapman, 208 U. S. 360.

In the case of People vs. Oriental Bank, 114 N. Y. Supp. 440, the Court say:

> "It cannot be said as matter of law that receivers are entitled to no compensation because the order appointing was vacated. That vacation did not proceed on the ground that the Court was without jurisdiction, but upon the ground that it was improvidently exercised."

In the case of Sullivan Timber Co. vs. Black (an Alabama case), 48 So. Rep. 870, decided in 1909, Mr. Justice Mayfield writing the opinion, this question of the right of a receiver to compensation out of the fund after a reversal of the order is fully discussed and the authorities examined, and the Court say:

> "Compensation should not be denied a receiver because the Court had no power to appoint if he was in fact appointed in a legal manner and has in good faith discharged the duties of such receiver. The Court would protect him while acting under the orders of the Court and may award compensation out of the

> estate or property entrusted to him for his reasonable services, notwithstanding the order of appointment is subsequently reversed and the bill under which he is appointed is dismissed."

As to the question of good faith of the Receiver here, that fact was not questioned at any of the hearings.

In the case of Palmer vs. Texas (212 U. S. 118), it appeared that the State of Texas brought suit in the State Court to forfeit a permit of the Waters-Pierce Oil Company to do business in that state and to recover all penalties for violation of the Texas anti-trust statutes. Verdict and judgment was rendered in favor of the State and against the company for over a million six hundred thousand dollars. Under the State law the State then had a lien on all of the property of the defendant to secure the judgment, which the property was insufficient to pay. Upon the rendition of the judgment, on petition of the State, a receiver was appointed to manage the property, and there was also an injunction that the property of the company should not be removed from the State. The defendant company appealed to the Supreme Court of the State, gave bonds on appeal, including a supersedeas, in a sum of double the amount of the judgment.

After these proceedings by the State, and before the State's receiver took possession of the property, one Palmer, a stockholder of the corporation, brought suit in the then United States Circuit

Court against the Pierce-Waters Company, reciting in his bill all of these proceedings by the State, and alleging that the laws of the State did not permit the penalties, etc., making a strong case in equity if under the circumstances the Circuit Court had had the right to proceed in the case; also praying for the appointment of a receiver. The defendant company confessed the bill. A receiver was appointed by the Court, who took possession of all of the property and business of the defendant company.

In addition to the equitable grounds stated in the complaint, jurisdiction to appoint the receiver in the Circuit Court was based upon the ground that the supersedeas bond had caused the State Court to lose its exclusive jurisdiction.

On application of the State's receiver to the State Court, that Court ordered its receiver by suits, etc., to assert the State's exclusive jurisdiction.

The State's Receiver then moved in the Circuit Court to vacate the appointment of the Federal receiver. Thus it is seen that the State by its Receiver became an active party to the action between the defendant company and its stockholders. The motion was denied by the Circuit Court. An appeal was then taken by the State and its Receiver to the United States Circuit Court of Appeals for that district. That Court reversed the order of the Circuit Court and vacated and discharged the receiver on the ground that the jurisdiction had first attached in the State Court, and that the

supersedeas bond did not suspend the powers of the State's receiver; that the State receiver was entitled to the possession of the property; and that the Circuit Court should not have appointed a receiver in the action; holding squarely that the jurisdiction of the State Court, having first attached, was exclusive.

The Appellate Court then made the following order:

> "The interlocutory order appointing a receiver is reversed and vacated and the case remanded for further proceedings not inconsistent with the opinion of this Court, and with instructions to discharge Chester B. Dorchester as receiver and to tax all the costs of the receivership against Bradley W. Palmer, the complainant."
>
> See State of Texas vs. Palmer, 158 Fed. 705.

The case was then taken by Palmer to the Supreme Court of the United States for review on certiorari. That Court, after a full discussion of the case, sustained the decision of the Circuit Court of Appeals as to the question of jurisdiction and the effect of the supersedeas bond, and conclude as follows:

> "Upon the whole case we are of opinion that the Courts of Texas had not lost the jurisdiction which they had acquired by the appointment of the receiver, and that the Federal Court ought not to have appointed a receiver to take possession of the property. We think the Circuit Court of Appeals was right in re-

versing the order of the Circuit Court appointing the Receiver";

and say:

"In that Court the costs of the receivership were assessed against Palmer, the original complainant. The receivership has gone on pending the proceedings upon appeal, and we are of opinion that *justice will be done* if the costs of the receivership are *paid out of the fund realized in the Federal Court,* and it is so ordered. Otherwise the judgment of the Circuit Court of Appeals is affirmed." (Italics added.)

The above case is on all-fours with this case as to the principle involved, even going further than the rule of each of the other cases, for the reason that it appears that the then Circuit Court appointed a receiver under circumstances where both the Circuit Court of Appeals and the Supreme Court decided that practically the Court had no jurisdiction to appoint. Of course this was not true fundamentally because the jurisdiction of both the State Courts and the Circuit Court were co-ordinate over the case, but for all practical purposes inasmuch as the State's jurisdiction had first attached, the jurisdiction of the Circuit Court was in abeyance by reason of the comity existing between the Courts (see 7 R. C. L., p. 1068, sec. 106, subject Courts), and it will be noticed that the Supreme Court orders the receivership costs paid "out of the fund," which of course would deplete the total of the property which was already in-

sufficient to pay the State's judgment, and would compel the State to have recourse on the supersedeas bond.

On another theory the Receiver must prevail in this matter, at least, to the extent of the allowances prior to the order appealed from, because each of the prior orders was a final order not appealed from; and in addition, a large proportion—exceeding $25,000—of the items objected to were actually in some instances and in effect in others, consented to by the appellants.

The facts on these questions are as follows:

The first report and account of the Receiver was rendered on the 2d day of November, 1918 (This Record, Vol. I, p. 209), and was a full report and account from the day of his appointment and taking over the property to and including the 23d day of October, 1918.

On the coming in of this report and one supplemental thereto, and in order to have the compensation of the receiver and his attorney treated as *deductions from the net income of the receivership during the fiscal year,* the parties (the defendants subject to certain objections inserted in the stipulation) stipulated that the sum of $4,270.76 was a reasonable sum to be allowed the Receiver and a like sum to be allowed his attorney from the 23d day of February, 1918, to the 31st day of December, 1918 (the proportionate amount at the rate of $5,000 per year each); and it was further stipulated that any Judge of the lower Court could make an order to that effect, and that there-

upon the Receiver might draw from the funds then in his hands the said sums and pay the same to himself and his said attorney. (See pp. 262–264, inc.)

This stipulation was dated the 11th day of December, 1918, and on the same day a Judge of the lower court made the order as stipulated and the same was filed (see p. 264).

The second report and account of the Receiver was filed on the 10th day of December, 1919. (This Record, Vol. I, pp. 275–289.) This account covered the period from October 31st, 1918, to and including the October 31st, 1919. To this account defendants filed objections on December 22d, 1919. (This Record, Vol. I, p. 289, to Vol. II, p. 293, inc.)

On the 6th day of January, 1920, this second report and account of the Receiver and allowance of compensation to himself and his attorney was confirmed. (This record, Vol. II, pp. 294–295.) The order was filed on the same day.

The third report of the Receiver was filed on November 30, 1920, covering the period from the end of his second account, October 31, 1919, to and including the 31st day of October, 1920. (This Record, Vol. II, pp. 296–311, inc.)

To this account defendants objected on the 4th day of December, 1920 (see Vol. II, pp. 312–313), the objections, however, conceding that the sum of $5,000 to the Receiver and $5,000 to the attorney were reasonable sums.

This account and the allowance of the compensation of himself and his attorney was confirmed by

the lower Court on the 4th day of December, 1920. (Vol. II, pp. 314–315.)

The exceptions of defendants (see Exceptions XII to XV, Inc., this record, Vol. II, at pp. 526–528 Inc.; Appellants' Opening Brief, pp. 6–8, Inc.) cover payments made by the Receiver in all four accounts, aggregating $57,730.06, and covering the following items:

To F. C. Handy	$17,400.00
To bookkeeper	4,213.33
For Court fees	70.00
For premium on bond	200.00
For traveling expenses	1,125.81
To Haskins & Sells	3,679.40
To Master in Chancery	2,500.00
To Receiver	14,270.76
To attorney for receiver	14,270.76

except that in the last exception (No. XV) counsel does not appear to have included the sum of $2,262.34 paid each to the Receiver and to his attorney, but see Exception X, and also Court's order on page 517, Vol. II, this Record, where, on motion of defendants (appellants), with reserved objections, the Receiver was authorized to retain $5,000, in order to satisfy balance of commissions, etc., hence the Court ordered a division of the balance between the Receiver and his attorney.

The F. C. Handy mentioned as having received $17,400 was the representative of the Receiver, at Shafter, Texas, and acted as superintendent and manager of the mine, in connection with E. M. Gleim, the superintendent of the defendant company, until about the first of December, 1918, and

subsequently alone until the Receiver's discharge by delivery of all of the property back to the company. The payment to Mr. Handy of the sum of $450 per month (the salary of the then superintendent of defendant) was consented to by the parties to the action, as appears from the correspondence mentioned in the affidavit of the Receiver made on the 5th day of August, 1921, and filed on that day (see Vol. II of this Record, commencing at p. 493), wherein it appears that after the attorney for the Receiver had made a full report to the attorneys for the respective parties concerning the qualifications and ability of Mr. Handy to satisfactorily fill the position mentioned, stating the amount of salary to be paid,—that is to say, $450 per month—both the attorneys for the complainants and the attorneys for the defendants replied by letter to the effect that there was no objection to paying Mr. Handy the sum of $450 monthly as salary, the attorney for complainants stating that he consented thereto for and on behalf of complainants, and the attorneys for defendants stating the same thing on behalf of defendants. (See both letters, in full on pp. 494, 495.)

The above amount of $4,213.33 was the amount in full paid to the bookkeeper employed by the Receiver to keep the books of the office, it being apparent from the reports of the Receiver that a bookkeeper was a necessity. This in part also resulted from a stipulation of all the parties, which is set out at page 499. This stipulation, it is true, on its face only applied to John W. F. Peat, who

was one of the defendants in the action and was a former secretary of the company (see p. 499), but who afterwards, becoming sick, resigned, and the Receiver appointed a successor, and on the resignation of that bookkeeper appointed another, who maintained the office until the office was turned over to the company (p. 497).

The item $1,125.81 covered the travelling expenses of the Receiver, his attorney and Mr. Handy on two trips to the property at Shafter, Texas, the first to take possession of the property and the second on a visit to look the property over, $579.25 of which was reported in the first account of the Receiver filed on the 2d day of November, 1918, and $546.56 of which was reported in the second report and account of the Receiver filed on the 10th day of December, 1919. (See Exceptions XII and XIII, pp. 6 and 7 of Defendants' Opening Brief.)

The item $3,679.40 paid to Haskins & Sells was the sum of $3,174.40 paid out under the order of the Court to Haskins & Sells during the year 1919 and allowed in the second account of the Receiver (see Vol. I, p. 281) and $630 expended; $505 in November, 1919, and $125 in September, 1920.

These audits were made each year by the Receiver for the purpose of seeing that the accounts were kept correctly and as preparatory to the Income Tax Statements, and included the preparation of those statements. The larger amount of $3,174.40 was in consequence of the audit made under the order made by the lower Court on January 13th,

1919, which order was consented to by all parties. (This Record, Vol. I, p. 181.)

The item of $2,500 was paid to the Master in Chancery in 1918 as fee of the Master allowed by the lower Court, and was also confirmed by the order of confirmation of the second report of the Receiver. The item is found on page 281.

The balance consists of two items of $14,270.76 each, paid to the Receiver and his Attorney, as follows:

> $4,270.76 to the Receiver and his attorney for the year 1918, and allowed by the stipulation and order of December 11, 1918. (This Record, Vol. I, pp. 262–264, inc.)
>
> $5,000 paid to each and allowed in the order confirming Second Report and Account. (This Record, Vol. II, pp. 294, 295.)
>
> $5,000 paid to each and allowed in the order confirming Third Report and Account. (This Record, Vol. II, pp. 314, 315.)

And a balance of $2,262.34 to each, not included in the above, allowed in the order confirming the Fourth Account. (This Record, pp. 504–506.)

It is apparent that at all times the Receiver was properly diligent in annually accounting for every payment made by him, either to others in regular course, or to himself and his attorney, and that in the case of payments to himself and his attorney and in all other payments that were in any sense out of the due course of the business of the company to have the amounts allowed and ordered paid by the Court.

It further appears that all of the amounts paid to F. C. Handy, the Receiver's representative at Shafter, were consented to by the parties. In a sense the amount paid to the bookkeeper was consented to. The order for the appointment of Haskins & Sells was consented to. This makes a total of $25,292.40 of the payments excepted to, which were consented to by the parties.

The consent to the payments would eliminate from Exception XV (Appellants' Opening Brief, p. 8) covering the objections to the Fourth Account filed on the 27th day of May, 1921, the item of $2,100 paid to Mr. Handy, and the $500 paid to the Receiver's bookkeeper, leaving only as to that account the sum of $50 for the premium on the Receiver's bond excepted to, and the two sums of $2,262.34 subsequently paid each to the Receiver and his attorney, so that all other sums expended by the Receiver and objected to and excepted to are covered by the orders of confirmation and allowance for the years 1918, 1919, and 1920, none of which orders were appealed from, and it is contended that whatever these orders may be as between the parties, based upon the stipulations of the parties or the objections and exceptions made as between them during those years, that as between the Receiver and each of the parties the order of confirmation and the allowance in each instance was a final appealable order as to each item allowed.

At the argument counsel for appellants cited the case of Heinze vs. Butte etc. Co., 129 Fed. 337,

which was decided by this Court in 1904, and the Court under the facts in that case holds that neither an order of the Circuit Court approving monthly reports of a receiver, nor one directing him to pay expenses incurred by him made before the coming in of his final account is a final order, and the appeals were dismissed.

But see the later case of Ruggles vs. Patton, 143 Fed. 312, which case is identical with the case at bar, and the Receiver was a party to the appeal.

It will be noticed that the order there was that the Receiver should pay himself the sum of $20,000 for the year 1904, and the Court say:

> "That this order applied to the Court's receiver is no test of its finality. If the receiver presents any particular matter touching his action for the Court's approval and the Court upon a proper hearing decides in favor of the receiver and approves his conduct, or discharges him from liability in respect of the particular matter, would it be said that the matter would remain open and subject to reconsideration upon the application of anyone interested, * * * simply because the receivership was not then terminated? The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to whether the receivership was thereafter continued, but in the nature and character of the order itself.

When Mr. Patton was ordered to pay to himself out of the funds in his hands as custodian of the Court the sum of $20,000 for the services for 1904, that sum of money was just as absolutely withdrawn from the custody of the Court as if he had been ordered to pay it to a third person."

"The fact that he was then the Court's receiver and that he continued to be the Court's receiver gave the Court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect, than it could exercise over any other party obtaining funds through the order of the Court."

Also see the case of Pennsylvania Co. vs. Philadelphia, 266 Fed. 1 (1920). This was a receivership case, in which the Philadelphia Company petitioned the Court to reimburse it for moneys it had advanced. The petition was resisted by the Receiver and other parties. The Court, however, granted the petition and ordered a certain amount of the money paid to the Philadelphia Company. From this order the appeal was taken and a motion was made to dismiss it on the ground that it was not final.

The Court (bottom of p. 4) say:

"In denying this motion, it is sufficient to say, very briefly, that the order appealed from directs the payment of the fund to one determined to be entitled to it. It is both a disposition of the fund and a determination of the rights

of everyone claiming it. On performance, the money would pass beyond the control of the Court forever. As nothing remains to be done, except to pay over the money, it is a final determination of the particular matter, and is, therefore, a final decree and appealable although the receivership, having to do with innumerable unrelated matters, shall still continue. Ruggles vs. Patton, 143 Fed. 312, 74 C. C. A. 450; Trustees vs. Greenough, 105 U. S. 527, 26 L. Ed. 1157."

The Court further say (top of p. 5) that—

"The appellants' right of appeal depends upon their interest in the fund * * *. The appellants' claimed interest in the fund was there in collision with the appellees, claimed right to the fund."

The latter statement by the Court is applicable here. As between the Receiver and the Presidio Mining Company it was perfectly apparent at the time of each order that the Receiver was directed to pay himself and his attorney these separate sums out of the fund (see this Record, Vol. I, p. 263; Vol. II, p. 295 and p. 315), and thereby the money was in each instance separated from the fund and the interest of the Receiver and his attorney in collision with the interest of the appellants, and as said in the case of Ruggles vs. Patton the Court has no authority to call back the fund. It would indeed be a harsh rule if a receiver paying out money to others and to himself under order of Court, in a case where the good faith of the payment or its reasonableness

was not in question, could long after payments had been made and after the time to appeal from the orders had passed, be compelled on the appeal from the final account—only final because it was last —to pay back the money merely because the Court still retained jurisdiction of the receiver, and could be urged to coerce him to perform the act through the Court's power to refuse to confirm his last account, which last account was not connected in any manner with the three previous accounts.

Each account was a distinct and separate case, so to speak; and the Court will notice that the so-called final account of the Receiver merely accounts from the end of the fiscal period of the last account,— that is to say, October 31st, 1920, to its date (see this Record, Vol. II, p. 326), and the order of approval of the Court appealed from did not purpose to apply to the previous accounts. See order appealed from (Vol. II, p. 504), where the order recites that "said Receiver having filed herein his final report and account of his administration covering the period from October 31st, 1920, to and including," etc., which was exactly what the Receiver was ordered to do *on motion of appellants' counsel* (This Record, Vl. II, pp. 356–358), which order commands (bottom of p. 357) the Receiver to "file herein a report and account of his receivership *since his last report and account,*" etc.

The above case of Ruggles vs. Patton is also approved in the case of Bankers Trust Company vs. Missouri etc. Ry. Co., 251 Fed. 789, which was a receivership, and an administrative order was held

to be a final order, the Court (bottom of p. 796) saying:

> "The compensation of receivers is usually fixed by administrative orders, and those orders are reviewable by the Appellate Court generally as interlocutory, but sometimes as final orders."

The reasoning of the Court in the last case following the above excerpt would lend support to the intimation in the opinion in the Heinze case, commencing on p. 339 (129 Fed.), that whenever the orders approving receiver's accounts are held to be interlocutory, they are subject to review on appeal from the final decree disposing of the entire case, but that would not help appellants on this appeal, because such a final decree is yet to be entered.

It will be noted that in the stipulation to the first account (This Record, Vol. I, p. 262) the reason for a yearly account and the allowance of the items of expenditure is apparent because it is recited in the stipulation that the Receiver has asked the Court for an allowance to himself and his attorney covering the year 1918, in order that the expenses of the receivership may be treated as deductions from the net income of such receivership during this fiscal year. Therefore, upon the allowance of this expense it would assist in fixing the net income of the Presidio Mining Company for taxation purposes under the Income Tax Law, so that it was material to have it fixed yearly.

In conclusion, it may not be out of place to state that the total of money handled; the character and amount of other property; the fact that it was

mining property of large value situated at a long distance from the Court; the consequent burden of responsibility that was necessarily placed upon the Receiver; the admirable and exact manner in which the trust was fulfilled; the large amount of time that was necessarily taken in its administration; and the reasonable sum of the fees charged, certainly suggest that the Receiver is entitled to the utmost consideration by the parties to this action; especially when it is remembered that the Receiver did not seek the position; that the lower court merely announced the appointment of a receiver but not of this Receiver, and that this Receiver was the selection, on their own motion, of the parties to the action.

It is respectfully submitted that on the whole case, so far as the Receiver is concerned, the order of the lower Court appealed from should be affirmed.

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